No. 92-359

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

KEENE CORPORATION,

Petitioner,

—v.—

LEONARD ADAMS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF THE CASE

There is no legitimate constitutional basis to justify the continued imposition of punitive damages in these, or any other, asbestos cases. Plaintiffs' Response to Keene's Petition does not undercut the need for Supreme Court review. Instead, plaintiffs offer the mantra of oft-repeated traditional justifications for punitive damages in other kinds of products liability cases - justifications that were long ago stripped of any validity by the enormity of present day asbestos litigation.

This Court has *never* considered the constitutional implications of multiple punitive damages awards for the same course of conduct. This Court has *never* addressed the issues uniquely raised by a mass litigation that dwarfs anything

previously encountered or even contemplated by this Court. This Court has *never* held that, despite bankruptcies, hundreds of millions of dollars in awards, billions of dollars in payments and more than 200,000 cases, further punishment is still needed.

None of the lower courts which have addressed the issue of repetitive punitive damages in asbestos litigation to date have had the benefit of Pacific Mutual Life Ins. Co. v. Haslip, ___ U.S. ___, 111 S.Ct. 1032 (1991) which provides the necessary constitutional framework within which to evaluate these issues.

Haslip firmly established that punitive damages awards must be examined under federal constitutional standards. They are not purely a matter for consideration under state law. Had this or any other court undertaken such an

examination, the inescapable conclusion would have been that continued punitive damages awards in asbestos cases violate defendants' due process rights.

Without explanation, the punitive damages verdicts in these cases were not properly reviewed by either the trial court or the West Virginia Supreme Court of Appeals, despite the latter court's ruling in Garnes v. Fleming Landfill, Inc., 413 S.E.2d 897 (W. Va. 1991). Plaintiffs use terms such as "described", "confirmed" and "clarified" to characterize the holding in Garnes, in an effort to obscure the outright declaration by the Garnes court that the West Virginia punitive damages scheme - the same scheme under which the punitive awards were made in these cases - violated defendants' due process rights.

In contravention of the explicit mandate of both Haslip and Garnes, neither of the reviewing courts took new evidence or examined the type of additional facts necessary for proper review of the verdicts. Indeed, the review procedures in place at the time foreclosed consideration of any such additional evidence. Keene properly preserved the arguments raised in this petition before both the trial court and the appellate court.

The meritless, and sometimes disingenuous, arguments raised by plaintiffs must not dissuade this Court from this long overdue analysis of the constitutional implications of repetitive punitive damages awards in asbestos-related mass tort litigation. Keene's Petition for Certification must be granted.

ARGUMENT

I.

THIS COURT MUST REVIEW THE REPETITIVE PUNITIVE DAMAGES VERDICTS IN THESE CASES UNDER THE CONSTITUTIONAL STANDARDS ESTABLISHED IN PACIFIC MUTUAL LIFE INS. CO. v. HASLIP.

This Court has never considered the issue of the constitutionality of repetitive punitive damages in the mass tort context.[1] Plaintiffs cannot offer one case in which the unique question of the due process limitations on repetitive

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[1] Plaintiffs suggest that "[t]his argument has been repeatedly rejected by this Court in cases raising precisely the same circumstances as the instant Petition." Pb 5. In support of this proposition, plaintiff cites five Circuit Court decisions, *each of which this Court declined to review.* Pb 7. This Court repeatedly has admonished that a "denial of certiorari imparts no implication or inference concerning the Court's view of the merits...." Farr v. Pitchess, 409 U.S. 1243, 1246 (1973); Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912, 919 (1950).

punitive damages awards in asbestos cases has been considered by this Court.[2]

Plaintiffs suggest that this Court should not consider Keene's Petition since the "propriety" of punitive damages has been decided by the substantive law of West Virginia. Pb 6. This argument misses the mark. West Virginia appellate courts have never considered the issue of repetitive punitive damages in asbestos cases under the Haslip analysis.

Plaintiffs cite the case of Davis v. Celotex Corp., 1992 WL 130567 (W. Va.), for the proposition that the West Virginia Supreme Court of Appeals

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[2] None of the cases cited by plaintiffs was decided after this Court rendered its decision in Haslip. The Second Circuit, which decided both Simpson v. Pittsburgh Corning Corp., 901 F.2d 277 (2d Cir. 1990). *cert dismissed* 111 S.Ct. 27 (1990) and Johnson v. Celotox Corporation, 899 F.2d 1281 (2d Cir. 1990) *cert. denied* 111 S.Ct. 297 (1990), earlier had expressed concern over the constitutional implications of repetitive punitive damages in asbestos litigation. Racich v. Celotex Corp., 887 F.2d 393, 398 (2d Cir. 1989).

"rejected precisely the same issues raised by Keene." Pb 10. This baldly misstates the Davis holding. The Davis court did not decide the issue of repetitive punitive damages, but rather, expressly *declined to address the issue*, due to an underdeveloped factual record. Id. at *9.[3]

Even so, Haslip held that state substantive law is not the last word on the constitutionality of punitive damages. This Court held that the Due Process Clause imposes both substantive and procedural limitations on state court awards of punitive damages. Haslip, 111 S.Ct. at 1044-46. Haslip established the parameters within which punitive damages

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[3] One can only assume that plaintiffs' statement that Garnes and Davis were decided *prior* to the trial of these cases (Pb 16) is a scrivener's error, since the trial court in these cases had the benefit of neither Garnes, Davis nor Haslip.

must be awarded in order that they not run afoul of a defendant's Federal Constitutional due process rights.

Finally, plaintiffs incorrectly suggest that Keene is precluded from arguing the appropriateness of repetitive punitive damages awards due to its failure to present evidence on the issue below. Pb 16-17. Keene preserved the issue for appeal since the constitutionality of repetitive punitive damages was fully briefed to both the trial and appellate courts.

Plaintiffs argue instead that Keene should have introduced evidence of prior punitive damages awards and of its financial condition to the courts below. Pb 5-6. Yet, plaintiffs concede that these, and several other factors which must be considered under Haslip, "would likely have prejudiced Keene, and under

such circumstances, the trial court would have been obligated to keep such evidence from the jury." Pb 19. This "Catch 22" approach to constitutional law must not be given credence by this Court.

Once the jury rendered its verdict, the laws which governed review of punitive damages awards in West Virginia at the time in which the verdicts were rendered precluded examination on review of any evidence not presented to the initial finder of fact. Haga v. King Coal Chevrolet Co., 150 S.E.2d 599 (W.Va. 1966). West Virginia law affirmatively precluded Keene from presenting the type of evidence which must be considered under Haslip, and precluded the trial and appellate courts from taking additional evidence on the issue, as required by Haslip. See, Garnes, 413 S.E.2d at 909;

Johnson v. Hugo's Skateway, 1992 WL 213940 (4th Cir. (Va.)).

* * *

Plaintiffs present no valid grounds for a refusal by this Court to consider the due process implications of repetitive punitive damages awards for the same course of conduct in mass tort litigation. This Court should grant such review.

II.

THE PUNITIVE DAMAGES AWARDED IN THESE CASES CANNOT WITHSTAND CONSTITUTIONAL SCRUTINY AND MUST BE REVERSED.

The reviewing courts below implemented neither the substantive, nor the procedural, due process protections required under Haslip. Since their failure to do so cannot pass constitutional muster, the punitive damages verdicts cannot be allowed to stand.

This Court held that, substantively, punitive damages awards may not exceed the amount required to meet the societal goals of deterrence and retribution. Haslip, 111 S.Ct. at 1044-45. Procedurally, a system of awarding punitive damages must provide adequate mechanisms for ensuring that an award of punitive damages is not constitutionally excessive - that is, that the award furthers the goals of deterrence and retribution. Id.[4]

The jury in these cases assessed twenty-one separate punitive damages verdicts against Keene, while a second jury, simultaneously hearing the

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[4] The other "goals" for punitive damages awards since articulated by West Virginia courts have not been and should not be adopted by this Court. Encouraging litigation, achieving personal revenge, promoting settlement and providing additional compensation for injured plaintiffs are not the standards against which the propriety of punitive damages should be judged.

identical evidence and applying the same legal "standards", found that no punitive damages were warranted. The trial court then reviewed the verdicts under a scheme which considered none of the factors mandated by Haslip. Finally, in contravention to Haslip and its own holding in Garnes, the West Virginia Supreme Court of Appeals simply refused to review the verdicts. Under Haslip, these unconstitutional verdicts, rendered under a wholly unconstitutional procedural format, cry out for review.

As more fully set forth in Keene's initial Petition, deterrence long ago ceased being a legitimate rationale to support punitive damages in asbestos cases. It is ludicrous to suggest now, at this stage of the litigation, when the majority of the asbestos-producing market is bankrupt or insolvent, when joint and

several liability requires Keene and the other remaining manufacturers to pay the shares of the absent defendants, when Keene has disposed of 78,000 cases but still faces over 87,000 claims, when new cases are being filed at a rate of 2000 per month, when Keene has pledged 80% of its remaining net worth to resolve the remaining meritorious lawsuits, when Keene already has been assessed $13 million in punitive damages, and when virtually every defendant ceased producing asbestos products decades ago, that more punitive damages awards in asbestos cases are necessary to deter anyone from anything.

Surely, one cannot argue with a straight face that defendants in asbestos cases have not "learned their lesson." Nor can one rationally suggest that any "message" intended by punitive damages in

asbestos litigation has not long ago been heard by every manufacturer in this country. Only contingent fee attorneys can still justify punitive damages in asbestos cases in 1992 - though they do so at the expense of Americans who lose their jobs due to mounting bankruptcies and future plaintiffs who will receive no compensation when the limited funds eventually run out.

Plaintiffs' suggestion that punitive damages are necessary to encourage settlements defies logic and ignores facts. Plaintiffs makes the astounding statement that punitive damages are necessary because "Keene refused to settle its cases." Pb 20 (emphasis supplied). It takes both parties to reach a settlement. Punishing the decision to exercise the right to trial has never been a legitimate basis for

perpetuating punitive damages.[5] Finally, plaintiffs' argument is just plain wrong. Several commentators have noted that punitive damages deter settlements, not encourage them. Brickman, The Asbestos Litigation Crisis: Is There a Need for an Administrative Alternative?, 13 Cardozo L. Rev. 1819, note 202 at 1868 (1992); Schwarzer, Punishment Ad Absurdum, 11 Cal. Law. 116 (Oct. 1991). Thus, the traditional rationales for punitive damages which undergird Haslip's substantive due

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[5] Apparently, plaintiffs believe that punitive damages should deter Keene and other defendants from exercising their constitutional right to a jury trial. They cannot honestly claim that punitive damages are still needed to promote settlements. Keene has settled over 78,000 cases! It has settled hundreds of cases with plaintiffs' counsel, Henderson & Goldberg, in the last two years alone. Keene would have settled more, but Henderson & Goldberg insisted on trials in some cases, apparently hoping for a lottery-sized punitive award. Also, the fact that some of the plaintiffs' verdicts against Keene were completely offset by settlements from other companies only indicates that those claimants had been fully compensated already.

process framework do not support the jury's awards in these cases.

Finally, the nearly nonexistent post-verdict review process violated the procedural due process protections of Haslip. In Haslip, this Court upheld the procedural protections implemented by the Alabama Supreme Court, which requires a detailed post-verdict review by the trial court of at least nine factors to determine whether a punitive damages award is constitutionally excessive. 111 S.Ct. at 1044. A similar analysis is required on appeal to determine whether the punitive damages award "'exceed[s] an amount that will accomplish society's goals of punishment and deterrence.'" Id. at 1045 (quoting Green Oil Co. v. Hornsby, 539 So.2d 218, 222 (Ala. 1989)).

Both this Court and the West Virginia Supreme Court of Appeals found the West

Virginia punitive damages scheme to be constitutionally deficient under Haslip. Fleming Landfill, Inc. v. Garnes, ___ U.S. ___, 111 S. Ct. 2882 (1991); Garnes, 413 S.E.2d 897. After declaring West Virginia's procedures unconstitutional, the Garnes court established post-trial review procedures which satisfied the Haslip mandate. Id. at 908-9.

Not a single one of the constitutionally necessary review procedures mandated by Haslip and adopted by Garnes was followed in these cases. The trial court did not undertake such an analysis, and the appellate court did not even consider the petition.[6]

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[6] To the extent that either court reviewed the verdicts, they were constrained by West Virginia's now displaced rule that jury verdicts be upheld unless "the award of punitive damages has no foundation in the evidence so as to evince passion, prejudice or corruption in the jury...." Wells v. Smith, 297 S.E.2d 872, 880 (W. Va. 1982).

Garnes specifically held that the West Virginia punitive damages scheme, which was in place and applied in these cases, unconstitutionally provided insufficient review by the trial court of punitive damages awards under Haslip. Garnes, 413 S.E.2d at 908.[7]

* * *

The punitive damages awards in this case, assessed under the unconstitutional West Virginia punitive damages scheme, cannot stand.

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[7] Plaintiffs argue that "requir[ing] an appellate court to automatically review all cases awarding punitive damages, as Keene suggests, would discourage settlements and increase the cost of litigation, contrary to the purpose of such awards." Pb 21. Unfortunately for plaintiff, not only Keene, but this Court in Haslip and the West Virginia Supreme Court of Appeals in Garnes disagree.

CONCLUSION

For the foregoing reasons, as well as those expressed in Keene's initial Petition, Keene Corporation's petition for certiorari should be granted.

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